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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 674

AUTOMOBILE TRANSPORTERS WELFARE FUND and WALTER F. CAREY, DENTON JOLLY, E. J. HAND, JAMES R. HOFFA, CHARLES E. BOND and WILLIAM R. WALSH, Trustees of AUTOMOBILE TRANSPORTERS WELFARE FUND,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of New York.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. .....

AUTOMOBILE TRANSPORTERS WELFARE FUND and WALTER F. CAREY, DENTON JOLLY, E. J. HAND, JAMES R. HOFFA, CHARLES E. BOND and WILLIAM R. WALSH, Trustees of AUTOMOBILE TRANSPORTERS WELFARE FUND,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the State of New York.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on October 3, 1963.

CITATIONS TO OPINION BELOW

The New York Court of Appeals did not write an opinion in this case. Its judgment denying petitioner's motion for reargument and granting petitioners' motion to

amend remittitur is printed in Appendix A, *infra*, p. 9. Its judgment affirming, without opinion, the judgment of the Appellate Division of the Supreme Court, First Department, is printed in Appendix B, *infra*, pp. 11-13. The opinion of the Appellate Division of the Supreme Court, First Department, reversing the judgment of the Supreme Court for the State of New York, New York County, is officially reported at 17 App. Div. 2d 448, 235 N. Y. S. 2d 702, and is printed in Appendix C, *infra*, pp. 14-23. The opinion of the Supreme Court for the State of New York, New York County, is officially reported at 34 Misc. 2d 907, 228 N. Y. S. 2d 907, and is printed in Appendix D, *infra*, pp. 24-28.

JURISDICTION.

The judgment of the Court of Appeals of New York was entered on August 8, 1963 (App. B, *infra*, pp. 11-13). A timely petition for rehearing was denied on October 3, 1963 (App. A, *infra*, p. 9). The jurisdiction of this court is invoked under 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED.

Whether New York's requirement that the assets of a multi-state, multi-employer welfare fund be expended to pay for its (New York's) expense in auditing such fund subtracts from the value of the right of employers and unions under the National Labor Relations Act, 1947 to agree collectively that these assets be expended to provide economic protection for employee beneficiaries and is, therefore, preempted by this Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are Article I, Section 8, and Article VI, Clause 2, of the United States Constitution. They are printed in Appendix E, *infra*, pp. 28-30. The statutory provision involved in this proceeding is Section 37-f of Article III-A of the New York Insurance Law. It is printed in Appendix F, *infra*, p. 32.

STATEMENT.

Petitioner Automobile Transporters Welfare Fund (hereinafter referred to as the "Fund"), is a bilateral welfare fund established in accordance with Section 302 (c) of the Labor Management Relations Act, 1947, as amended (hereinafter called the "Act")[1] (R. 45).[2]

The Fund engages solely in interstate activities (R. 51-52). The employers contributing to, and the unions representing employee beneficiaries of, the Fund are engaged in interstate commerce or in industries affecting interstate commerce (R. 49). The Fund covers between 15,000 and 16,000 employees located in 24 states (R. 50). Approximately 97 per cent of these employees reside and work outside New York (R. 50).

Respondents, the People of the State of New York, instituted the action below to compel the Fund to pay expenses incurred by the Department of Insurance of the State of New York in auditing the books of the Fund at the Fund's sole and principal place of business in Detroit,

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[1] Petitioners Walter F. Carey, Denton Jelle, E. J. Hand, James R. Huff, Charles F. Bond and William R. Walsh are the Trustees of the Fund (R. 38-39, 50). Pursuant to Section 302 (c), there are an equal number of trustees representing the employers and the unions.

[2] Record references "R" refer to folios in the Record on Appeal unless otherwise indicated.

Michigan (R. 38-43). These expenses totalled $4,337.85 (R. 41). The audit was conducted pursuant to Article III-A of the Insurance Law of the State of New York (R. 40-41), which regulates employee welfare funds. Section 37-f of that Article provides that the welfare fund, not the Department of Insurance, shall bear the expense of the audit.

The fund acknowledges the Department's authority to conduct the audit but not its authority to impose its expenses upon the Fund.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioners' answer in the Supreme Court of the State of New York affirmatively alleged the objections to state jurisdiction on the ground relied upon in this petition (Ans. pars. 6-13; R. 48-53). The pre-emptive character of the National Labor Relations Act, 1947, Article I, Section 8, and Article VI, Clause 2 of the Constitution was briefed and argued in the Court of Appeals (App. A, *infra*, 9; R., page 63).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With National Labor Policy Which Requires That the Parties, Not the States, Determine How Assets of Welfare Funds Are to Be Spent.

Congress requires employers and unions to bargain concerning the creation and maintenance of welfare funds. *Inland Steel Co.*, 77 NLRB 4, *enf'd* 170 F. 2d 247, *cert. den.* 336 U. S. 960. The trust establishing the Fund "is in the nature of a public contract permitted, if not actually enjoined, by law for the benefit of the employees and their dependents." *Philadelphia National Bank v. Empioying Bricklayers Association of Philadelphia*, 169 F. Supp. 591,

597. By requiring employer contributions and by limiting its benefits to employees (and their dependents) of such contributing employers, collective agreements maintain the Fund and define its coverage. Hence, the Fund is the fruit of, and inextricably bound to, the collective bargaining process. The Fund, in turn, enriches this process by providing "the means through which the employers provide the health and accident insurance and medical care for their employees." *NLRB v. Chain Service Restaurants*, 302 F. 2d 161, 173 (2nd Cir.).

It is now established that federal labor law governs the activities of employers and unions preceding the execution of collective agreements, *San Diego Building Trades Council v. Garmon*, 359 U. S. 236; the collective agreements themselves, *Local 24, Teamsters Union v. Oliver*, 358 U. S. 283, and clauses relating to welfare funds of such agreements, *Lewis v. Benedict Coal Co.*, 361 U. S. 459; *Coos Bay Lumber Co. v. Local 7-116*, 203 Ore. 342, 358-359, 279 P. 2d 508, 515. At the same time, however, there are exceptions to the general exclusion of state control over collective bargaining and the relationships it calls into being. Union-security provisions of collective agreements furnish one example (*Retail Clerks Local 1625 v. Schermerhorn*, 373 U. S. 746); the fiduciary duties of trustees of pension and welfare funds, another (*Plasterers' Ass'n v. Plasterers' Local*, 279 F. 2d 92 (7th Cir.)). But even where certain aspects of collective bargaining are "designedly left open to state control," national labor policy excludes state legislation which "impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act." *Allen Bradley Local 1111 v. Wisconsin Board*, 315 U. S. 740, 750, 751; *Local Union 429 IBEW v. Farnsworth and Chambers Co., Inc.*, 353 U. S. 969.

Petitioners acknowledge that neither the Labor-Management Relations Act, 1947, as amended, nor the Welfare &

Pension Plans Disclosure Act of 1958[1] supercedes the authority of states to investigate, examine, and audit welfare funds. At the same time, however, the legislative history of the latter Act demonstrates that Congress did not intend that either its own or state regulation of welfare funds should financially burden such funds:

> "It is the policy of this bill [The Welfare & Pension Plans Disclosure Act of 1958] to protect the revenues of the United States, the interests of participants in the plans, their beneficiaries, the employers and the public, and *to conserve the moneys involved so as to assure their utilization for intended purposes.*" 1958 U. S. Code Congressional and Administrative News, p. 4154. (Italics added.)

This concern reflects Congressional intent to retain the preemptive restrictions of the National Labor Relations Act, 1947, as amended, on state action.

Thus, the decision below presents the question whether Section 37-f subtracts from "the rights guaranteed and protected by the Federal Act." Clearly, it does. Section 37-f represents New York's legislative determination that the welfare fund assets be expended to relieve it, and ultimately its taxpayers, of the cost of auditing such funds. This diverts the assets from the purpose intended by the parties.[2] But Congress enables the parties to enter into collective agreements establishing and maintaining welfare funds; therefore, the "paramount force of the federal law" (*Local 24, Teamsters Union v. Oliver, supra*, at 296-297) embodied in such agreements prevents the several states from diverting the assets from the parties' intended pur-

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[1] This Act was amended in 1962, Public Law 87-420, 29 U. S. C. Sections 301, *et seq.*

[2] Federal labor law prescribes that payments to welfare funds must be used "for the sole and exclusive benefit of the employees" of the contributing employers. (Section 302 (c), (5).)

pose. Moreover, this diversion subtracts from the value of the agreement both to the parties and to the employee beneficiaries; it diminishes the assets available to provide economic protection for such employees. (Cf. *Lewis v. Benedict Coal Corp., supra*, at 469.) As these assets derive exclusively from employer contributions, they constitute "another form of compensation to the employees." *Lewis v. Benedict Coal Corp., supra*, at 469; *United States v. Carter*, 353 U. S. 210 at 217-218. It is, then, the employee beneficiaries whose earnings pay for the audit. Accordingly, New York's insistence that its expenses for its audit be paid out of the assets of the fund deprives the employees of the full fruits of their collective bargain.

It is respectfully submitted, therefore, that the decision below is inconsistent with the principles enunciated by this Court in *Local 24 Teamsters Union v. Oliver, supra*, and *Allen-Bradley Local 1111 v. Wisconsin Board, supra*.

B. The Importance of the Issue.

Generated, in part, by federal labor and tax policies (Internal Revenue Code, Section 501 (c) (9), 26 U. S. C. A. 501 (c) (9)), and, in part, by the desire of employees to protect themselves against financial losses occasioned by sickness and accident, welfare funds since World War II have become an increasingly important subject of collective bargaining and an increasingly important means for providing economic security for employees:

> "In 1960, three-fifths of the national and international unions had collective bargaining contracts providing health and insurance benefits for 80 percent or more of the workers they represented as compared with less than two-fifths in 1954." Bureau of Labor Statistics, 85 Monthly Labor Review, 276-277 (1962).

Despite this growth in the coverage and in the significance of collectively negotiated welfare funds, no decision by this

Court has delimited the respective functions of federal and state law in securing to employee/beneficiaries the fullest protection of their equitable interests in such funds.

Because many collectively negotiated welfare funds are multi-state funds, such delimitation is particularly necessary. The instant fund, for example, operates in 24 states. Each of these states possesses legislative power equal to New York's; they, too, may enact legislation similar to Section 37-f, and thereby create a "multiple burden" (*Joseph v. Carter and Weeks Stevedoring Co.*, 330 U. S. 423 at 429) on the Fund.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

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Counsel for Petitioners.

Of Counsel:

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APPENDIX "A"

Decision	Court of Appeals—October 3, 1963
	Motion for reargument denied.
M. No. 639 The People, etc., Respondent, vs. Automobile Transporters Welfare Fund & ors., Trustees of Automobile Transporters Welfare Fund, Appellants.	Motion to amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: "Appellants contended that 37-f of the Insurance Law assessing the Welfare Fund for the entire costs of the examination (1) is void as a denial of due process and of equal protection under the Fourteenth Amendment of the Constitution of the United States, (2) is void as constituting an undue burden on interstate commerce (U. S. Const., Art. 1, 8), and (3) is void as in conflict with basic Federal policy. The Court of Appeals held that '37-f of the Insurance Law does not offend against the Constitution or Federal policy."

APPENDIX A

State of New York,
In Court of Appeals

(At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Third day of October, A. D. 1963.

Present, Hon. Charles S. Desmond, Chief Judge presiding.

Mo. No. 639

The People &c.,

Respondent,

vs.

Automobile Transporters Welfare Fund & ors., Trustees of Automobile Transporters Welfare Fund.

Appellants.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto, the following:

Appellants contended that 37-f of the Insurance Law assessing the Welfare Fund for the entire cost of the examination (1) is void as a denial of due process and of equal protection under the Fourteenth Amendment of the Constitution of the United States.

(2) is void as constituting an undue burden on interstate commerce (U. S. Const., Art. I, § 8), and (3) is void as in conflict with basic Federal policy. The Court of Appeals held that § 37-f of the Insurance Law does not offend against the Constitution or Federal policy.

And the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

s/ Gearon Kimball,
Deputy Clerk.

APPENDIX "B"

Supreme Court of the State of New York

The People of the State of New York, Plaintiffs, against Automobile Transporters Welfare Fund, and Walter F. Carey, Denton Jolly, E. J. Hand, James R. Hoffa, Charles E. Bond and William R. Walsh, Trustees of Automobile Transporters Welfare Fund, Defendants.	**Judgment on Remittitur to Court of Appeals.** 41438 61.

The above-named defendants having appealed to the Court of Appeals of the State of New York from the judgment in the above entitled action entered in the office of the Clerk of the County of New York on the 16th day of January, 1963, which judgment was entered upon an order of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 20th day of December, 1962, which said order reversed the judgment of the Supreme Court in the above-entitled action entered in the office of the said Clerk of the County of New York on the 10th day of July, 1962, and which said order in favor of the plaintiffs, People of the State of New York, and against the defendants, Automobile Transporters Welfare Fund, and Walter F. Carey, Denton Jolly, E. J. Hand, James R. Hoffa, Charles E. Bond and William R. Walsh, Trustees of Au-

tomobile Transporters Welfare Fund, granted judgment in favor of the plaintiffs and against the defendants in the sum of $4,337.85 with interest from March 10, 1959 amounting to $997.81 together with the sum of $383.85 costs as taxed making in all the sum of $5,719.51, and from each and every part of said judgment and order as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed and the judgment entered for the plaintiffs, the People of the State of New York, with costs, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law, and the remittitur from the said Court of Appeals having been filed herein and the order having been entered herein naming the order and judgment of the said Court of Appeals the order and judgment of this Court:

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the plaintiffs herein, it is hereby

Adjudged that the said judgment entered herein on the 16th day of January, 1963, be and the same hereby is affirmed; and it is hereby

Adjudged that the plaintiffs, the People of the State of New York recover of the defendants Automobile Transporters Welfare Fund, and Walter F. Carey, Denton Jolly, E. J. Hand, James R. Hoffa, Charles E. Bond and William R. Walsh, Trustees of Automobile Transporters Welfare Fund, the sum of $274.35, the amount of his cost herein as taxed and that he have execution against said defendants therefore.

Judgment signed and entered this 9th day of August, 1963.

.....

Clerk.

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August 9th, 1963
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APPENDIX "C".

Opinion of Appellate Division.

SUPREME COURT,
APPELLATE DIVISION—FIRST DEPARTMENT.
November 1962

Charles D. Breitel, J. P.,
Benjamin J. Rabin,
Harold A. Stevens,
Samuel W. Eager,
Aron Steuer, JJ.

5297

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs-Appellants,

vs.

AUTOMOBILE TRANSPORTERS WELFARE FUND, and WALTER F. CAREY, DENTON JOLEY, E. J. HAND, JAMES R. HOFFA, CHARLES E. BOND and WILLIAM R. WASH, Trustees of Automobile Transporters Welfare Fund,
Defendants-Respondents.

Appeal from (1) order of the Supreme Court at Special Term (Gold, J.), entered May 8, 1962 in New York County, which denied plaintiffs' motion for judgment on the pleadings and granted defendants' cross-motion for judgment on the pleadings, (2) from order entered June 1, 1962 denying reargument and (3) from the judgment thereon entered July 10, 1962.

Samuel A. Hirshowitz, of counsel (Philip Kahaner and Gretchen W. Oberman with him on the brief Louis J. Lefkowitz, Attorney General) for appellants.

Charles R. Katz, of counsel (David Previant with him on the brief; Katz & Wolchok, attorneys) for respondents.

BREITEL, J. P.:

The issue in this appeal is whether the State may impose the cost of its examination on an interstate union-employer welfare fund organized and having its sole and principal office outside the State. Involved, apart from questions of lesser significance, are Federal statutes and the assertion by the fund of a pre-emptive effect; and State statutes with an assertion of explicit exemption.

Special Term, on cross-motions for judgment on the pleadings under rule 112 of the Rules of Civil Practice, granted judgment to defendants, that is, the welfare fund. It held that Congress, by virtue of the Federal statutes, had largely pre-empted the States from any regulation or examination of welfare funds in the labor-management field. Specifically, it held that the examination and the power to impose the cost of such examination on the welfare fund were not within the area saved to the States.

The order should be reversed and judgment on the pleadings should be granted in favor of plaintiffs. Concededly, there are no issues of fact.

The fund describes itself as a multi-state, multi-employer fund covering 15,000 to 16,000 employees, employed in 24 States. It was created by a trust indenture in collective bargaining between employers and unions and its administration conforms to the requirements of Federal Statute (U. S. Code, tit. 29, § 186). Its sole and principal office is in Detroit, Michigan. Approximately 400 to 500 or three per cent of the covered employees are residents of New York. The fund is jointly maintained by employers and unions, and it provides health and welfare benefits for the employees.

The State of New York, through its Insurance Department audits the books, records and affairs of the fund which, pursuant to State statute (Insurance Law, Art.

III-A, § 37, *et seq.*), is registered with the Superintendent of Insurance (*id.* § 37-b). In this action the State seeks to recover the cost of such audit made in 1958, in the amount of $4,337.85. Bills were rendered for this sum, in part on November 18, 1958, and for the balance on March 10, 1959.

First, the fund asserts it is not subject to regulation by the State, and that, indeed, it is made expressly exempt by the State statute. To support this position, the fund points to section 466 of the Insurance Law. That section, it is true, exempts certain labor union organizations and operations from the application of the Insurance Law. However no one part of a statute is supreme over another, as a constitutional provision is when juxtaposed with a conflicting statute. It suffices that Article III-A of the Insurance Law provides, elaborately, for supervision of welfare funds like defendant fund and for expenses of such examinations to be borne by the examined funds. Consequently, it is not necessary, although not difficult, to reconcile the provisions of section 466 with Article III-A. In any event, the later-enacted and more specific statute would control. In short, the State legislation does not exempt from, but, on the contrary, includes welfare funds under State supervision.

Second, the fund argues that Federal statute pre-empt the regulation of welfare funds; and, therefore, it is neither subject to State examination nor is it liable for the cost of such examination. In 1958, and later, by amendments in 1962, Congress enacted the Welfare and Pension Plans Disclosure Act (U. S. Code, tit. 29, § 301, *et seq.*). Under the Act welfare plans must be published in prescribed form (§ 305); there must be summary annual financial reports (§ 306 [a][1]); and there must be detailed reports on investments and "insider" loans (§ 306 [f]). In addition to requiring reports and imposing penalties for violations, the statute, as amended in 1962 (P. L. 87-420), empowers

the Secretary of Labor to make investigations in connection with limited dispensations from the duty to report and to ascertain violations of the reporting requirements (§§ 304, 308). Because of these provisions the fund argues the State is pre-empted, as a matter of Congressional intention, from regulating welfare funds to the extent of audit and imposing the cost of such audit on the examined fund.

The fund never says that the State is wholly pre-empted, but argues that it is to the extent of covering any financial matter already required to be included in the Federal reports. So, the fund concedes that the States could still regulate the liquidation or dissolution of welfare funds, as was held in *Matter of Thacher* (10 N. Y. 2d 439); but that an audit and the imposition of the cost of an audit on the examined fund is another matter.

Congress was not silent in this statute on the area of possible pre-emption. Section 309 provides:

> "§ 309. Effect of other laws—State laws
>
> "(a) In the case of an employee welfare or pension benefit plan providing benefits to employees employed in two or more States, no person shall be required by reason of any law of any such State to file with any State agency (other than an agency of the State in which such plan has its principal office) any information included within a description of the plan or an annual report published and filed pursuant to the provisions of this chapter if copies of such description of the plan and of such annual report are filed with the State agency, and if copies of such portion of the description of the plan and annual report, as may be required by the State agency, are distributed to participants and beneficiaries in accordance with the requirements of such State law with respect to scope of distribution. *Nothing contained in this subsection shall*

be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.

"(b) The provisions of this chapter, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States *or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.*" (Emphasis supplied.)

The language would seem to be dispositive. The first subdivision, with limited qualifications, forbids the States to require duplication of the report-making required of welfare funds. All other State regulation is expressly preserved. Report-making is not the equivalent of inquiry into and regulation of the facts upon which the report is based. Under the 1962 amendments the Federal power of investigation is keyed exclusively to the making of reports and failures to make reports. True, a failure to make a proper report may, and more likely would, introduce inquiry into the facts upon which the report should have been made; but there is no correlative power to correct or control what is behind the report. Such correction or control would lie in the area of substantive regulation, rather than in the formal area of disclosure and report.

The second subdivision makes certain that the power of the States affecting the "operation or administration" of welfare plans, as distinguished from mere disclosure or report-making, is not impaired. The State statute provides internal controls on the operation and administra-

tion of welfare plans. Thus, section 37.1 enumerates several categories of prohibited payments and expenses. In addition, various sanctions, penal and civil, are attached to several categories of misconduct. State audit of the welfare fund is a direct means of enforcing such regulatory requirements, which, unlike the Federal statute, are not confined to the making of reports or even of wholly complete or honest reports. Moreover, the 1962 amendments expressly excluded from the Secretary of Labor the power to regulate welfare funds. It was provided:

> "(h) Nothing in this Act shall be so construed or applied as to authorize the Secretary to regulate, or interfere in the management of any employee welfare or pension benefit plan, except that the Secretary may inquire into the existence and amount of investments, actuarial assumptions, or accounting practices only when it has been determined that investigation is required in accordance with section 9 (d) of this Act." (P. L. 87-420, § 15, U. S. Code, tit. 29, § 308, as amended.)

Consequently, the very statute enacted by Congress precludes, rather than extends, preemption, by its express terms except in the narrow field of report-making and disclosure of the character specified in the Federal statute. The legislative history, despite some ambivalent language in the committee reports, supports this construction; it shows awareness of State regulation, and intention not to interfere with such regulation and to confine the Federal statute to a disclosure function (see Senate and House Committee Reports, 1958 U. S. Code, Cong. and Adm. News, p. 4137, *et seq.*). Finally, in the statute, the findings and policy were expressed to accomplish merely "requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto" (§ 301 [b]).

Both the State Court of Appeals and the United States Supreme Court have had occasion with this or closely related legislation to hold that there was no pre-emption.

Thus, in *Matter of Thacher* (10 N. Y. 2d 439, *supra*), referring to the Federal statute in this case and quoting the provisions saving the jurisdiction of the State, the Court of Appeals, per Chief Judge Desmond, said:

> "That is about as far away from Federal pre-emption as you can get. Clearly, the intent of Congress was to leave in the State a large measure of regulatory power over these insurance funds, an intent which is not surprising in the light of history. Insurance has been traditionally subjected to State police power control (citing cases)." (at p. 444.)

In the *Thacher* case a welfare fund was involved. True, the holding related to its liquidation, but the rationale was broad enough to embrace a restatement of what is evident enough anyway in the language of the Federal statute.

The Supreme Court considered the Labor-Management Reporting and Disclosure Act in *De Veau v. Braisted* (363 U. S. 144) and its pre-emptive effect on State jurisdiction. That statute (U. S. Code, Tit. 29, § 401, *et seq.*), also enacted in 1959, also contained express provision saving jurisdiction of the States (*id.*, § 523), and is closely related in purpose and spirit to the Federal Statute in this case. Referring to and rejecting the proffered argument of pre-emption, Mr. Justice Frankfurter, on behalf of the Court, said:

> "Just the opposite conclusion is indicated by the 1959 Act, which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of preemption to inference. When Con-

gress meant pre-emption to flow from the 1959 Act it expressly so provided." (at p. 156.)

These words are completely applicable to the Federal statute in this case.

Thus, whichever way one turns, it is evident that the Federal legislation is limited to disclosure and report-making and that the conscious and expressed purpose was not to displace State regulation of welfare funds.

Indeed, the concurrence of statutory language, legislative history, and the views of the highest courts of the State and the nation, make strong and unequivocal argument for rejection of preemption;—a stronger one is difficult to conceive. Moreover, it is evident, too, that were displacement of State regulation to occur, there would be no existing machinery to regulate the operation and administration of welfare funds, the report-making object of the Federal legislation being extremely limited, by intention and design. It therefore follows that the State had the power to require audit examination of the fund and that no doctrine of federal pre-emption precludes such examination or the regulation of which it is the significant instrument.

The fund argues that it is not engaged in the business of insurance and therefore is not subject to the broad regulation of insurance concededly reserved to the States. At best, this is a dispute over words. It should suffice that the fund operates an employee benefit plan coming flatly within the provisions of Article III-A of the Insurance Law. Moreover, both the Federal and the State statutes involved describe employee welfare plans as providing insurance (U. S. Code, tit. 29, § 302; Insurance Law, § 37-a). Still further, *Matter of Thacher, supra*, referred to a welfare plan as insurance. Nor in this connection is the interstate character of the fund of special significance so long

as it purports to provide benefits to a substantial number of residents of New York. The power of the State to protect its residents in dealings with interstate organizations in this area is hardly questionable (U. S. Code, tit. 15, §§ 1011, 1012; *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, esp. 429-430; *Robertson v. California*, 328 U. S. 440, esp. 459-460; *F. T. C. v. National Casualty Co.*, 357 U. S. 560, 563-5). Finally, whether welfare plans fit within the category of insurance is not essential to the determination because, in the very Federal statute discussed, the continued power of the State to regulate welfare plans is recognized expressly.

It is worthwhile, in passing, to indicate that the system of assessing the cost of examination by the Superintendent of Insurance on the subjects of examination is one of many years standing. Thus, under section 32 of the Insurance Law, a section of long lineage, the examination cost of insurers is charged back to such insurers.

The fund also quarrels with Article III-A of the Insurance Law, arguing that it is unreasonably discriminatory because its application is exclusively to bilateral funds (*i. e.*, funds jointly maintained by employers and unions) and that unilateral (*i. e.*, funds maintained only by employers) are exempted from its application. Certainly, the fact that there is no union or employee participation in unilateral funds may be a reasonable basis for distinction. The burden of disputing that distinction and showing unreasonable discrimination is on the one attacking the constitutionality of the statute (*Farrington v. Pinckney*, 1 N. Y. 2d 74, 78; McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 150). That showing has not been made.

In view of the determination it is not necessary to consider the other matters raised with regard to the right

of the State to collect the cost of an examination made prior to the enactment of the Federal statutes.

Accordingly, the judgment and order granting judgment in favor of defendants should be reversed, on the law, with costs to plaintiffs-appellants, plaintiffs' motion for judgment on the pleadings should be granted, and defendants' cross-motion for judgment on the pleadings should be denied.

All Concur.

APPENDIX "D".

Opinion.

SUPREME COURT.
SPECIAL TERM PART I.
By Mr. Justice Gold.

People, &c., v. Automobile Transporters Welfare Fund—Plaintiffs move for an order striking out the answer of the defendants and for judgment on the pleadings, and upon the ground that the answer is insufficient in law, pursuant to Rule 112, and section 476 of the Civil Practice Act. The action is instituted pursuant to Article III-A of the Insurance Law, and seeks the recovery of the cost of the reasonable service and expenses incurred by the Insurance Department of the State of New York in auditing the books, records and affairs of the defendant welfare fund, an employee welfare fund registered with the Insurance Department of the State of New York. Defendants cross-move for judgment on the pleadings. The following facts set forth in the answer are deemed to be true.

Automobile Transporters Welfare Fund is a trust fund which consists of an equal number of union and employer trustees (Title 29, U. S. C. A., section 186). The employers who made the contributions on behalf of their employees to the fund are engaged in interstate commerce. The fund covers 15,000 to 16,000 employees who are resident in twenty-four states of the United States, 3 per cent. of whom are located in the State of New York. The sole and principal place of business of the fund is in Michigan. The fund was created by a Trust Indenture. It was not created by the State of New York and it is not required to receive any license or permission from the State of New York. It is a private trust consisting of equal representation by employers and unions and registered with the insurance department pursuant to Article III-A of the Insurance Law.

The Welfare and Pension Plan Disclosure Act of 1958, as amended, provides in section 16 (a) as follows: "In the case of an employee welfare or pension benefit plan providing benefits to employees employed in two or more States, no person shall be required by reason of any law of any such State to file with any State agency (other than an agency of the State in which such plan has its principal office) any information included within a description of the plan or an annual report published and filed pursuant to the provisions of this Act if copies of such description of the plan and of such annual report are filed with the State agency, and if copies of such portion of the description of the plan and annual report, as may be required by the State agency, are distributed to participants and beneficiaries in accordance with the requirements of such State law with respect to scope of distribution. Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from *otherwise regulating such plan*" (emphasis supplied) and in section 16 (b) as follows: The provisions of this act, except subsection (a) of this section and section 15, and any action taken thereunder shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the *operation or administration* of employee welfare or pension benefit plans, or in any manner to authorize the *operation or administration* of any such plans contrary to any such law." (Emphasis supplied.) The intent to preempt jurisdiction in the field must be made manifest. Such intent is clearly expressed in the quoted provisions, for if exclusive federal jurisdiction were not intended there would be no need to specify a limited area in which state jurisdiction was granted. The culling out of a limited area of state jurisdiction excludes from state jurisdiction what was not granted, including

the authority to impose inspection cost. The federal statute provides that no state shall require any person to supply to it the information which by the federal statute is required to be supplied to the state agency in which the trust has its principal office. Under no construction of the federal statute may any other state impose a liability to pay the cost of inspection with reference to the information required by the federal statute to be supplied to the agency of the domiciliary state.

Indeed, the cost of inspection may not be imposed upon the defendant in any event. In Alderstein v. City of New York (11 Misc. 2d 754, aff'd 7 App. Div. 2d 717, aff'd 6 N. Y. 2d 740), the city endeavored to support the imposition of a license fee of $250, conceded not to be an imposition for the purpose of revenue, as a source to compensate the licensing authority for issuing and recording the license and to pay for inspection in relation to the enforcement of the licensing provisions. It was there held that inspection has nothing to do with licensing. Here, too, it has nothing to do with registration.

The defendant was not created by state authority and is not operating by virtue of any license issued to it. Legislative regulation of the recipients of special privileges from the states may include the imposition of cost of inspection (Charlotte Railroad v. Gibbs, 142 U. S. 386; Bronx Gas & Electric Co. v. Maltbie, 268 N. Y. 278). If authority exists to impose such a liability upon a defendant, engaged as this defendant is in interstate commerce, without license or permission of any kind from the State of New York, it could result in the imposition of the cost of inspection of the defendant's records by all of the twenty-four states in which the members of the constituent unions are resident. This would be an intolerable burden on the defendant, and an unwarranted burden on interstate commerce. The inspection in this instance, in fact,

occurred in the State of Michigan, the domiciliary state of the fund. To the extent that the plaintiffs rely on Huron Portland Cement Company v. Detroit (362 U. S. 440), the court there stated: "We do not reach the question of the validity of the inspection sections as they might be applied to appellant, but limit our consideration solely to what is presented on this record—the enforcement of the criminal provisions of the Code." The fact that the defendant is registered with the New York State Insurance Department is of no consequence, since under the Insurance Law the defendant is exempted from the licensing provisions of the Insurance Act. Such registration cannot support the claimed authority to impose inspection costs even though the federal statute in its regulatory provisions is more modest than the regulatory provisions contained in the state statute in relation to what may be done with respect to the information filed in the State of Michigan (Rice v. Santa Fe Elevator Corp'n, 331 U. S. 218).

It is further notable that the fund was created as the result of collective bargaining under the National Labor Relations Act. The fund was created for the benefit of the employees and may not be diminished by appropriation therefrom of the cost of this inspection, and nothing contained in the Welfare and Pension Plan Disclosure Act permits such diminution to be made by virtue of any provision of the New York State Insurance Law.

Plaintiffs' motion is denied. Since under the federal statute jurisdiction has been preempted save as to the small area of state jurisdiction conferred, and since the particular action involved here is not within the limited area of state jurisdiction conferred, and since in any case inspection cost may not be thus imposed (Alderstein v. City of New York, supra) the motion of the defendants for judgment on the pleadings must be granted. Settle order

Opinion on Motion for Reargument.

By Mr. Justice Gold.

People, &c., v. Automobile Transporters Welfare Fund—Plaintiffs move for reargument of their motion to strike out the answer of the defendants and for judgment on the pleadings, pursuant to Rule 112, and section 476 of the Civil Practice Act. The examination in Michigan was concluded in 1958. Plaintiffs argue that since 1947, when title 29, U. S. C. A., section 186, became effective, and until January 1, 1959, when title 29, U. S. C. A., section 301 (Welfare and Pensions Plans Disclosure Act), became effective, there was no federal statute requiring a welfare fund that had registered with the superintendent of insurance to file financial reports with the insurance department. Section 37-f of the Insurance Law of the State of New York provides: "* * * all charges * * * shall be presented to the trustees * * * therefor as certified and approved by the Superintendent * * * upon receiving such certified copy such trustees shall pay the amount thereof * * *." It is alleged in the complaint that pursuant to such statute the superintendent of insurance did present an itemized bill to the defendants on March 10, 1959. At that time the Disclosure Act was in effect. Plaintiffs further contend that in Alderstein v. City of New York (11 Misc. 2d 754, affirmed 7 App. Div. 2d 717, affirmed 6 N. Y. 2d 74), the court stated: "There is further agreement that the fee which may be charged for the issuance of a license is such that will compensate the licensing authority for issuing and recording the license and pay for inspection to see to the enforcement of the license provisions." There are no license provisions whose enforcement is to be looked to for the defendants have not been licensed under the Insurance Act of the State of New York and the limited or restricted permissible area of charge may not be invoked in the absence of the existence or necessity for license. The motion for reargument is denied.

APPENDIX "E".

Article I. Section 8.

The Congress shall have power

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Article VI.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties

made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives beforementioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any officer or public trust under the United States.

APPENDIX "F".

Section 37-1 of Article III-A. of the New York Insurance Law:

"Examinations; expenses. The expenses of every examination of the affairs of any employee Welfare Fund, including any appraisal of real property, made pursuant to the authority conferred by any provision of this chapter, shall be borne and paid by the employee welfare fund so examined, but the superintendent, with the approval of the comptroller, may in his discretion for good cause shown remit such charges. For any such examination by the superintendent or a deputy superintendent personally, the charge made shall be only for necessary travelling expenses and other factual expenses. In all other cases the expenses of examination shall also include reimbursement for the compensation paid for the services of persons employed by the superintendent or by his authority to make such examination or appraisal. All charges, including necessary travelling and other actual expenses, as audited by the comptroller and paid on his warrant in the usual manner by the comptroller to the person or persons making the examination or appraisal, shall be presented to the trustees of the employee Welfare Fund in the form of a copy of the itemized bill therefore as certified and approved by the superintendent or a deputy superintendent. Upon receiving such certified copy such trustee shall pay the amount thereof to the superintendent, to be paid by him into the state treasury."

* The section was amended by laws 1959 ch 648 eff April 21st [illegible] to provide for graduated scale of charges and to permit the superintendent to refund as well as remit the charges [illegible]